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The Imminent Wave of Federal Regulations

President Obama's second term promises to be among the most intense periods of regulatory activity since the late 1970s. The major focal points for new rules will be three of the country's largest industries: health care, energy/environmental, and financial services. This regulatory tsunami will affect virtually all Americans.

Major Features of the New Regulatory Climate. Several themes will shape the regulatory process over the next four years.

1. Continuing gridlock between the parties will make it very difficult for Congress to adopt any legislation that is not supported by a broad consensus. Policymaking will be driven by the administrative and regulatory decisions of Executive agencies.
2. The expected increase in domestic energy supplies, especially the availability of cheap oil and natural gas obtained from shale formations, will have significant impacts on the next generation of regulations. This effect will be most pronounced for the rules that offer the largest benefits and impose the greatest costs – Clean Air Act rules issued by the Environmental Protection Agency.
3. If the President had been defeated, the Administration was prepared to publish by January 20 a large number of "Midnight Rules" that the White House had held at the Office of Management and Budget throughout 2012 to avoid creating reelection problems. The pace of regulatory activity will increase substantially over the next few months as this backlog is reduced and the White House clears rules for publication.
4. Given the impasse in Congress, the principal recourse for entities adversely affected by the forthcoming wave of rules will be litigation. This likely will lead to a substantial increase in the regulatory lawsuits filed in the District of Columbia.

Priority Regulatory Areas. The three principal areas for enhanced regulatory activity share an important feature — how well the new rules work will be critical in determining the President's historical legacy.

Health Care

The pace of rulemaking to implement the Affordable Care Act of 2010 will accelerate over the next few months for several reasons. First, efforts by the Department of Health and Human Services (HHS) to implement the statute were slowed by constitutional challenges to its core mechanism, which were not resolved until June 2012. Second, the White House slowed or delayed implementing rules in advance of the elections, to avoid creating new political problems involving the statute. Finally, many of the provisions of the law do not take effect until 2014. Their delayed effectiveness gave HHS an unusual opportunity to develop a long-term plan for sequencing the development and issuance of the necessary implementing rules.

Among the key anticipated HHS regulations are:

- If Congress and the Administration fail to avoid sequestration, how to administer a 2% reduction in Medicare payments to providers.
- The allocation of funding cuts among "Disproportionate Share Hospitals" that serve an unusually large number of low-income patients, now that more Americans should be covered by either Medicaid or insurance under the Affordable Care Act.

- Determination and administration of some \$700 billion in additional Medicare provider cutbacks mandated by the ACA through 2019.
- Employer mandate and penalty provisions for large companies that do not offer health coverage to full-time employees, or whose coverage is deemed either too expensive or to provide insufficient benefits.
- Further development of the bundled payment systems under which physicians and hospitals treating a patient for related conditions would be paid an overall sum rather than for each component treatment.
- Development of penalties for hospitals whose rates of readmission for certain diagnoses are higher than established limits.
- How to implement healthcare cost reduction proposals by the Independent Payment Advisory Board that are not reversed by Congress.
- Additional guidance on the use of personal health information under HIPAA and privacy rules.
- Further refinement of the development and operation of state and federal health insurance exchanges.

With the Supreme Court decision and the elections behind it, HHS now has four years to go as far as it can, as fast as it can to establish the basic model for the future delivery of health care in the country. To the extent the agency can issue rules and implement provisions of the Affordable Care Act between now and 2017, it will lock those policy choices into the DNA of the American health care system, even if some provisions of the law are subsequently modified.

HHS moved to seize this opportunity immediately after the elections by sending a series of proposed rules to OMB for clearance. The White House authorized issuance within days, and on November 20, the agency announced the issuance of proposed rules to: (1) prohibit health insurance companies from discriminating against individuals because of a pre-existing or chronic condition and allow insurers to vary their rates based only on age, tobacco-use, family size, and geography; (2) establish the policies and standards in 10 priority areas for coverage of essential health benefits in health care plans; and (3) expand employer-based wellness programs to promote health and help reduce health care spending.

Implementation of the Affordable Care Act will lead to a decade of litigation. For example, dozens of lawsuits have been filed to challenge the Administration's policy that most employers must cover contraception in their health care plans. A challenge also has been filed suit against HHS' Recovery Audit Contractor program, under which the agency has denied hospitals recovery for medical procedures where alleged "bounty hunter" auditors later concluded that inpatient care should have been delivered on an outpatient basis.

Energy/Environmental

During President Obama's first two years in office, EPA had a green light to proceed aggressively with rules to address air pollution. One of the most significant actions approved by the White House Regulatory Review Program was the designation of Greenhouse Gas (GHG) emissions as a pollutant of primary concern to human health and the environment. That determination led directly to (1) regulations issued by EPA and the Department of Transportation that require automobile manufacturers to remake their vehicle fleets to meet aggressive tailpipe emission limits and an average fuel economy standard of 54.5 mpg by 2025; and (2) an EPA rule that compelled the largest industrial facilities to obtain Clean Air Act permits for their GHG emissions

After its losses in the 2010 elections, the Administration substantially ramped back EPA's ability to issue new rules. In particular, in 2011 the President directed EPA not to issue a regulation to reduce ozone emissions that contribute to smog formation, an action that almost led to the resignation of the EPA Administrator. Pending the elections, OMB also slowed its clearance process on rules applicable to coal-fired industrial facilities.

Now that the President has been reelected, EPA again will receive a green light to proceed, subject to avoiding confirmation problems for the new Administrator to be nominated in the near future. EPA currently has 26 rules under review at OMB, and seven other major rules have been cleared since December 1. EPA will have four years in which to shape future U.S. climate change policy

by issuing the first generation of GHG emission control rules, and it will act rapidly to advance its priorities, with the litmus test being an anticipated rule imposing GHG limitations on new power plants. Already, on November 16, EPA proposed revisions to its mercury and air toxic standards for future electric generating facilities, and on December 14 tightened limits on fine particulates (soot) predominantly emitted by power plants and vehicles. These rules will accelerate the economy's anticipated shift away from coal as a fuel source. EPA also will issue a new ozone rule once it has completed an update of the underlying science.

With the division in Congress, challenges to EPA rules will be funneled through the courts. For example, two days after the elections, EPA sent OMB for approval an important final rule to regulate stormwater discharges from logging roads. The White House cleared the rule in 22 days so that EPA's lawyers could announce the action at an oral argument before the Supreme Court on December 3, likely mooted a challenge to the agency's authority.

EPA's ability to justify new Clean Air rules will be facilitated by the anticipated future availability of large quantities of oil and natural gas from shale formations. These new sources of energy will lower substantially the costs of rules that will require regulated entities to shift away from fuels that produce higher levels of GHGs (i.e., from coal to natural gas). Since EPA's justification for GHG rules will depend upon an expanded natural gas supply, EPA can be expected to take a nuanced approach to regulation of the hydraulic fracking that will be essential to volume production.

Financial Services

The Dodd-Frank Act of 2010 imposed 398 rulemaking requirements on the financial supervisory agencies, but only 136 (34%) of the required rules have been finalized. The law established deadlines for issuance of 280 of those regulations, of which the agencies have missed 142. Several factors account for the slow pace of rulemaking. First, Congress did not provide the agencies with additional resources to address this crushing burden of new rules. Second, the statutory provisions require issuance of complex rules, and the comments submitted by the regulated companies, prepared by the country's best lawyers and economists, have taken considerable time for the agencies to understand and accommodate. Third, many of the new rules must be issued jointly by multiple regulatory agencies. The staff negotiations necessary to work out a common approach have often been protracted.

The pace of promulgation of the new financial services regulations will pick up in 2013. The financial regulatory agencies will accelerate efforts to finalize the 133 required rules that have been proposed and the 129 rules that have not yet been proposed.

Among the financial services agencies, the newly created Consumer Financial Protection Bureau will be a beehive of regulatory activity. Like EPA, the agency now has four years to issue rules in priority areas and to set the pattern for future consumer financial protection efforts in this country. Another area of great interest will be the actions of the newly-created Financial Stability Oversight Council, which consists in large part of the heads of the federal financial supervisory institutions and to which Congress has delegated responsibility to conduct comprehensive monitoring of the stability of the entire financial system. The Securities and Exchange Commission recently deadlocked in efforts to develop a rule to address the potential threats that money market funds could present to the financial system. In response to the SEC's inaction, the FSOC voted to propose for public comment various recommendations for structural reforms of money market funds to reduce the risk of runs and other problems that could spread through the financial system. Careful attention will be paid to the relationship between this entity, which is chaired by Treasury, and the fiercely independent financial regulatory agencies, to determine the FSOC's potential impact on the financial rulemaking process.

The principal recourse for institutions that disagree with the agencies' actions will be litigation. Several major challenges to Dodd-Frank rules already have been filed in the U.S. District Court for the District of Columbia. The principal issue in these cases will be whether the agencies rationally exercised the broad discretion they were granted by the statute and, where applicable, whether they conducted an adequate pre-promulgation analysis of the costs and benefits.